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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PAUL MAY,
Petitioner,

v.

NORM HAND and
YAMHILL COUNTY,
Respondents.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Plaintiff, an 18 year County employee, claims he was terminated from his employment because he ran for office in a non-partisan election in opposition to the successful candidate. The lower courts held that plaintiff was a "policymaker" who could be lawfully terminated without violating the First Amendment.

1. Does the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) apply to First Amendment claims of a County employee in a Sheriff's office terminated because the he ran for Sheriff against the successful candidate in a non-partisan election.

2. May an elected Sheriff require "political loyalty" of a County employee under the Elrod-Branti exception to the First Amendment, when the Sheriff is not a "hiring authority" for the County, when the Sheriff does not have authority to terminate County employees, when the County has adopted policies guaranteeing it's employees freedom from retaliation for political activity on non-work time and when the County has policies and practices giving it's employees a property interest in their positions.

LISTING OF PARTIES

The caption of the case contains the parties to the proceeding in the court whose judgment is sought to be reviewed.

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IN THE SUPREME COURT OF THE UNITED STATES

PAUL MAY, *Petitioner*

v.

NORM HAND and YAMHILL COUNTY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paul May respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a) is unreported. By order entered March 24, 2000, the Ninth Circuit denied the petition for rehearing and

suggestion for rehearing en banc (App., *infra*, 10a). The opinion of the district court (App., *infra*, 12a) is unreported.

JURISDICTION

On January 7, 2000, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion in this case. On March 24, 2000, the United States Court of Appeals for the Ninth Circuit entered its order denying Paul May's petition for rehearing and suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Facts

Paul May commenced employment with Yamhill County in 1979. In his 18 years of service, he was successively employed as a Deputy, a Sergeant, a Lieutenant, and a Captain.

To obtain his promotion to Lieutenant, he went through a competitive process, was promoted by the Yamhill County Board of Commissioners, served a year long period of probation and became a permanent employee in the Lieutenant's position. Subsequently, the Board of County Commissioners reclassified his Lieutenant's position into that of a Captain.

In 1996, Mr. May ran for election to the office of Yamhill County Sheriff. His opponent was Norm Hand, a management level employee of the McMinnville Police Department. In Oregon, election to the Sheriff's Office is non-partisan.

Captain Larry Hailey was also employed in the Yamhill County Sheriff's Office. Mr. Hand approached Captain Hailey before the election and sought his support. Mr. Hand told Hailey that he had heard Mr. May had attempted to get Captain Hailey fired but then Sheriff Lee Vasquez stopped Mr. May from doing so. Hailey spoke directly to Mr. May, personally investigated Mr. Hand's statements and concluded that what Mr. Hand reported to him was not accurate. Subsequently, Captain Hailey threw his support to Mr. May, writing letters to the editors of local newspapers, posting lawn signs and going door-to-door speaking to citizens on Mr. May's behalf.

The election was conducted in November, 1996. Norm Hand prevailed in the election and took office in January, 1997.

On February 20, 1997, then Sheriff Hand asked to meet with Captains Hailey and May. Sheriff Hand advised Captains Hailey and May that he intended to reorganize the office, eliminating their positions, and that they would be terminated effective March 31, 1997. Moments after the meeting with Mr. May and Mr. Hailey, Mr. Hand met alone with Mr. May and informed him that he was filing an election law complaint against Mr. May.

Mr. Hand's motives in eliminating the Captain positions of Mr. May and Mr. Hailey were apparent to County officials. Mr. Hand told one Yamhill County Commissioner that he did not want Mr. May anywhere in the organization because of a comment Mr. May's

wife had made in a local grocery store. The comment inferred that Mr. May would run for Sheriff again in four years.

Upon learning he was to be terminated, Mr. May retained an attorney who wrote to the Board of County Commissioners seeking an investigation of Mr. Hand's proposed action. Mr. Hand initially took the position he wanted Mr. May and Mr. Hailey out of the Sheriff's organization completely. However, two Yamhill County Commissioners declined to approve Hand's proposed action unless Hand offered Mr. May and Mr. Hailey meaningful positions within the Sheriff's organization.

Mr. Hand responded, initially, by offering both Mr. May and Mr. Hailey clerical positions as computer technicians. When Mr. May and Mr. Hailey rejected the clerical work, Mr Hand offered them employment as corrections officers.

Although Mr. May and Mr. Hailey were dissatisfied with the offer, they accepted the positions, reserving their rights to contest the legality of their terminations.

On March 31, 1997, Mr. May and Mr. Hailey were terminated from their employment. On April 1, 1997, Yamhill County hired both individuals to work as corrections officers. Mr. Hand's recommended offer of employment was approved by the Yamhill County Board of Commissioners.

In Yamhill County, employees working in the Sheriff's Office are County employees hired by the Board of County Commissioners, not the Sheriff.

Yamhill County employment policies and practices apply to County employees in the Sheriff's Office. Among the County policies that apply to employees of the Sheriff's Office, the County has adopted an ordinance giving all County employees a right to a hearing before, and a final decision from, the County Commissioners concerning any proposal to discipline or discharge the employee. Yamhill County has a practice extending over a period of twenty years of requiring just cause to terminate an employee.

The County has adopted a policy statement permitting employees to engage in political activity on non-work time to the maximum extent permissible under the law without fear of reprisal. Historically, employees in the Sheriff's Office have campaigned for election as Sheriff against each other. Indeed, the County's attorney told employees of the Sheriff's office that they were protected from retaliation if they ran for political office because County policy prohibited their removal from office without just cause.

There is no evidence in the record that any of these employment policies and practices have caused difficulty for, or disruption to, the operation of the Sheriff's Office.

Proceeding Below

Mr. May filed a complaint in the U.S. District Court alleging that he was terminated from his position as Support Services Captain and denied promotional opportunities because he ran for public office. Mr. May alleged that Sheriff Hand and Yamhill County breached an employment contract with plaintiff by terminating him from his position as Captain without just cause. He also alleged that he maintained a property interest in his employment as Captain which could only be terminated for cause arising by virtue of verbal promises, County policies, and County practices[1]. Mr. May claimed that his termination deprived him of the benefit of his property interest without due process of law. Petitioner's complaint was filed against Norm Hand, Sheriff of Yamhill County and Yamhill County. The jurisdiction of the District Court was invoked under 28 USC §1343 and 28 USC §1331. Jurisdiction of the state contract claim was invoked under 28 USC §1367.

Defendants filed for summary judgment on the grounds that: 1). Assuming Petitioner was terminated and denied promotion because he ran for election, his position as a Support Services Captain was a "policymaking" position under this court's decision in

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[1]Mr. May amended his complaint adding an age discrimination claim. The district court granted summary judgment against the claim. Petitioner did not appeal the dismissal of the age discrimination claim.

Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980); 2). Under Elrod-Branti, Petitioner's termination and any promotion denial was permissible under the First Amendment; and, 3). Petitioner's evidence was insufficient to show the existence of a contract, a statute, a County regulation or policy which created a property interest in his employment and which could only be terminated for cause.

On the First Amendment claim, Petitioner argued that the balancing test set forth in Pickering v. Board of Education, 391 U.S.563 (1968) applied to Petitioner's speech in an election campaign. Since respondents failed to produce evidence of any governmental interest which outweighs Petitioner's interest in commenting on matters of public concern, Petitioner argued the summary judgment motion should be denied.

On the Fourteenth Amendment claim Petitioner pointed to verbal promises, County policies and admissions from County managers to establish that his employment could be terminated only for just cause.

The district court granted Sheriff Hand and Yamhill County's Motion for Summary Judgment on the First Amendment claim, holding: 1). Generally, a public employee's claim for violation of the First Amendment is analyzed under Pickering v. Board of Education, 391 U.S. 563 (1968), however "policymaker" employees are excluded from First Amendment protection under this Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel,

445 U.S.507 (1980); 2). Under the Ninth Circuit's decision in Fazio v. City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997), the court conducts a functional analysis of the duties of the position, considering whether the position includes vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders to decide if the position is a policymaking position; and, 3). Applying the Fazio factors to Petitioner's duties, Petitioner was a policymaker who could be terminated for his political opposition to Mr. Hand in the election, as a matter of law.

The district court also granted Sheriff Hand and Yamhill County's Motion against the Due Process and breach of contract claims holding that Mr. May's evidence was insufficient to show the existence of a contract of employment, a statute, or a County regulation or policy which granted plaintiff a property interest in his Captain position which could only be terminated for cause.

The district court denied the motion for summary judgment against the First Amendment promotion claims concluding that the promotions plaintiff sought were not "policymaker" positions. Thus, the Elrod-Branti exception did not apply to those promotions.

At trial of the promotion claims, the district court excluded evidence of, and also instructed the jury it could not consider, Sheriff Hand's motives in terminating plaintiff from his Captain position. The jury returned a verdict in favor of defendant's on the promotion claims.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. In a memorandum decision by Circuit Judges Goodwin, B. Fletcher and Tashima, the Ninth Circuit Court of Appeals concluded although the Elrod-Branti cases concerned employees terminated for partisan political affiliation, the Ninth Circuit's decision in Fazio v. City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997) extended the Elrod-Branti exception to "political loyalty" cases, e.g., where an employee runs for election against his supervisor. The Ninth Circuit Court of Appeals concluded that the Fazio decision required dismissal of Mr. May's First Amendment claim.

On the breach of contract and Due Process claims, the Ninth Circuit declined to determine whether the district court erred in deciding Petitioner's breach of contract and Due Process claims. Even if Mr. May were an employee who could only be fired for "just cause", the panel reasoned, the determination that Mr. May could be terminated under the First Amendment as a "policymaker" effectively resolved his breach of contract and Due Process claims.

Paul May filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied

on March 24, 2000.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented in this Case Are Important

This case concerns an 18 year public employee with a claimed property interest in his position who was informed that County policy prohibited terminations because of an employee's political activity; who ran for public officer and, who was terminated because he ran for election as Sheriff in a non-partisan public election.

Mr. May's case raises two significant questions under First Amendment law: 1) Whether this court's partisan political affiliation decisions, Branti v. Finkel, 445 U.S. 507 (1980) and Elrod v. Burns, 427 U.S.347 (1976), extend to cases involving public employees terminated for speech in a non-partisan election, what the circuit courts have referred to as "political loyalty" cases; and, 2). If Elrod-Branti applies to such political loyalty claims, whether evidence that the elected official has neither hiring nor firing authority; evidence that the hiring authority (in this case the County) has adopted policies and practices giving employees property interests in their positions; evidence that the hiring authority has adopted policies guaranteeing County employees freedom from retaliation for supporting candidates in elections; evidence that these same County policies have been in effect for over twenty years without causing any difficulty for, or

disruption of, the Sheriff's Office; and, evidence that the employee in question, Mr. May, filled a County position, not a position of the Sheriff, creates an issue of fact as to whether a political affiliation requirement is a reasonable one for the position in question.

At present, the circuits' courts are divided as to whether the Elrod-Branti exception applies and, over how to apply Elrod-Branti, to claims such as Petitioner's. National uniformity is necessary because of the vital importance of free, democratic and informed electoral processes. This case involves fundamental questions of who may participate in elections to public office, what those participants may say in such elections and whether those participating in such elections may do so free from retaliation at work for their speech in election campaigns.

II. The Question of Whether the Pickering Balancing Analysis or the Elrod-Branti Exception Applies to Claims of Public Employees Terminated for Speech in Election Campaigns Has Split the Circuit Courts.

The First Amendment issues that Paul May raises in this Petition are issues that have divided the Courts of Appeals resulting in conflicting opinions between the circuits and conflicting panel opinions within the circuits.

Twenty-four years ago, a divided Court first held that the First and Fourteenth Amendments are violated by the politically motivated discharge of non-civil

service employees because of the employees nonaffiliation with a newly elected sheriff's political party unless the employees are "policymaking" employees. Elrod v. Burns, 427 U.S.347, 375 (1976). Four years later, in Branti v. Finkel, 445 U.S.507 (1980), this Court explained and narrowed the policymaking employee exception in two respects. First, the Branti opinion at two points described the issue posed as whether an employees "private political beliefs" (as opposed to public political beliefs) interfere with the discharge of the employees public duties. Branti, *supra*, 445 U.S.at 526, 517. Second, the Court acknowledged that the exception does not apply to all policymaking positions and stated that the

> "...ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Branti, *supra*, 445 U.S.at 518.

Following Elrod and Branti the circuit courts have struggled with the question of whether the Elrod-Branti "policymaker" exception is limited solely to cases of public employees terminated for their "private political beliefs" or extends to cases of public employees terminated for running for election in opposition to the successful candidate.

The decisions of the United States Court of Appeals for the Fourth Circuit are a prime example of the divisions within circuits on this issue. In Jones v. Dodson, 727 F.2d 1329, 1335 (4th Cir 1984), an "interim" Sheriff and a dispatcher claimed they were fired for political affiliations and expressive conduct. The Fourth Circuit Court of Appeals concluded that the Elrod-Branti exception was limited to discharges "solely for patronage reasons." If a discharge was motivated by overt speech in a political campaign, the court found, then the general First Amendment balancing test articulated in Pickering v. Board of Education, 391 U.S.563 (1968) applied, not the Elrod-Branti policymaker exception. Three years after Dodson, the Fourth Circuit again applied Pickering balancing to the claim of a Captain terminated by the Sheriff for political activity. Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir 1987). Thirteen years later, the Fourth Circuit, *en banc*, applied Elrod-Branti, rather than Pickering balancing, to claims of Deputy Sheriffs alleging they were fired for supporting the Sheriff's election opponent. Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir 1997). While the Jenkins *en banc* court applied the Elrod-Branti exception to political loyalty claims, the opinion did little to clarify Fourth Circuit law. Five judges endorsed the court's majority opinion and five judges dissented.

The opinions within the Ninth Circuit on the applicability of Elrod-Branti to "political loyalty" claims are also seriously divided. In Thomas v. Carpenter, 881 F.2d 828, 831 (9th Cir 1989), the Ninth Circuit applied Pickering balancing to the First Amendment claims of

a Sheriff's Lieutenant who alleged he was retaliated against for challenging the Sheriff in a non-partisan election. Similarly, in Finkelstein v. Bergna, 924 F.2d 1449, 1453 (9th Cir 1991), in a case where a prosecutor claimed he was suspended for statements made in an election campaign, the Ninth Circuit stated that the prosecutor's position was unimportant to the straightforward application of the general rule prohibiting discharge of public employees for protected speech. At least one district court within the Ninth Circuit has concluded that the Thomas and Finkelstein decisions require application of Pickering balancing to claims of public employees terminated for speech in election campaigns. Meek v. County of Riverside, 982 F. Supp. 1410 (C.D. Cal. 1997). Notwithstanding it's decisions in Thomas and Finkelstein, a more recent Ninth Circuit decision has applied Elrod-Branti to such claims with little explanation for the apparent departure from the court's earlier decisions. Fazio v. City and County of San Francisco, 125 F.2d 1328, 1332 (9th Cir 1997).

The United States Court of Appeals for the Fifth Circuit *en banc* has specifically rejected application of the Elrod-Branti analysis to "political loyalty" claims. In McBee v. Jim Hogg County, Tex., 703 F.2d 834, *vacated and remand'd*, 730 F.2d 1009 (5th Cir 1984), the Fifth Circuit Court of Appeals *en banc* found that the Pickering balancing analysis applied to the claims of three Sheriff's Deputies fired for campaigning for the Sheriff's opponent. The Fifth Circuit rejected a panel decision that Elrod-Branti extended to employment decisions based upon "support of and loyalty to a

particular candidate as distinguished from a political party." McBee, *supra*, 703 F.2d at 838, n. 1.

The Third, Seventh, Tenth and Eleventh Circuit Courts of Appeals have attempted to apply the Elrod-Branti analysis to decide claims of Sheriff's Office employees alleging they were terminated for speech involved in elections. The circuits have struggled with how to apply Elrod-Branti yielding plainly inconsistent results. *See*, Burns v. County of Cambria, 971 F.2d 1015, 1023 (3rd Cir 1992) holding that law was clearly established that an elected sheriff could not terminate a Chief Deputy, his substitute, and other deputies for supporting the sheriff's opponent; Upton v. Thompson, 930 F.2d 1209, 1282, *reh'g denied*, 938 F.2d 84 (7th Cir 1991) holding that deputy sheriffs may be terminated for campaigning for the losing candidate; Dickeson v. Quarberg, 844 F.2d 1435, 1442 (10th Cir 1988) holding sheriff could not terminate the head jailer and a special deputy for their political association with the prior sheriff; Terry v. Cook, 866 F.2d 373 (11th Cir 1989) holding sheriff may terminate deputies for failing to support him in an election.

III. The Ninth Circuit's Decision in this Case Was Erroneous.

Finally, and most significantly, the decision of the United States Court of Appeals for the Ninth Circuit in this case was erroneous. This Court's recent decision in O'Hare Truck Service v. Northlake, 518 U.S. 712, 135 LEd2d 874 (1996) demonstrates the Ninth Circuit's error when it failed to apply Pickering

balancing to Petitioner's claims. In O'Hare, this Court discussed Elrod-Branti as cases limited to claims based solely upon political affiliation:

> "Elrod-Branti involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of any inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by government."

O'Hare, *supra*, 135 LEd2d at 882. Emphasis Added.

"[A] different, though related inquiry ..." is called for when "a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from Pickering." O'Hare, *supra*, 135 LEd2d at 882.

When political affiliation and free speech issues are intermixed in a case, the Court made clear that Pickering balancing must be conducted.

> "A reasonableness analysis will also accommodate those many cases...where specific instances of the employee's

> speech or expression, which require balancing in the Pickering context are intermixed with a political affiliation requirement. In those cases, the balancing Pickering mandates will be inevitable."

O'Hare, *supra*, 135 LEd2d at 882.

There is little room to doubt, in this case, Mr. May's free speech rights are at the core of his complaint. He ran for public office, opposed Mr. Hand in public debates, and ultimately was terminated for doing so.

Similarly, there is little room to doubt that application of the Pickering balancing test, rather than the Elrod-Branti exception, would have yielded a different result in the lower courts. On the summary judgment motion, Sheriff Hand and Yamhill County presented no evidence that Mr. May's protected speech impaired discipline or harmony among co-workers, had a detrimental impact on close working relationships, impeded the performance of Mr. May's duties or interfered with the regular operation of the Sheriff's Office.

Both the district court and the Ninth Circuit Court of Appeals erred in failing to apply Pickering balancing to Petitioner's claims; and, both courts should have denied the motions because Respondents failed to make any showing of entitlement to summary judgment under Pickering.

If the Elrod-Branti analysis applies to claims such as Petitioner's, the second question presented in this case is equally important and the Ninth Circuit's decision equally erroneous.

The Ninth Circuit, and the district court, ignored two important limitations on the Elrod-Branti exception. First, both Elrod and Branti concerned non civil service employees. Elrod, *supra*, 427 U.S.at 351; Branti, *supra*, 445 U.S.at 509. This Court has never stated that the exception created by these two cases extends to claims of public employees with a property interest in their employment.

Second, to prove an exception to the First Amendment's protection, the "hiring authority" must present evidence that a political affiliation requirement is a reasonable requirement for the position in question. Branti, *supra*,445 U.S.518.

These two limitations on the Elrod-Branti exception make commonsense. The purpose of the exception is to insure that "representative government is not undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. Elrod, *supra*, 427 U.S.at 367. An elected official who has no hiring and firing power, or an official who must follow civil service rules created by others to hire and fire, has no ability to hire individuals who are politically loyal to the candidate, and thus, no need for such a requirement.

In this case, Petitioner presented evidence that Sheriff Hand was not a hiring authority, that Petitioner was not an "at will" employee, and that Petitioner's employer, Yamhill County, had policies and procedures which guaranteed employees the right to engage in political activity in non-work hours free from reprisal.

The district court and the Ninth Circuit declined to consider Petitioner's evidence in deciding whether political affiliation was an appropriate requirement for Petitioner's position. Instead, both courts limited their consideration to evidence of the duties of the position.

It makes little sense to say that a County employee employed by the Board of County Commissioners in a County that disclaims any interest in employees political activity outside of work hours and that assures County employees due process protections against discharge owes a duty of political loyalty to an elected official who is not the employee's hiring authority. The very protections the County has created and the fact that the County has assumed to itself hiring authority necessarily shows that Petitioner is not a "policymaker" for the **Sheriff**. If the Elrod-Branti analysis applies, this Court should conclude that plaintiff's evidence is sufficient to create an issue of fact as to whether a political affiliation requirement is an appropriate one for the position in question.

CONCLUSION

For the foregoing reasons, Petitioner requests

that the Court grant the petition for certiorari, reverse the order granting summary judgment on the First Amendment claim and remand for trial of the claim, reverse the order affirming the jury's verdict on the promotion claims and affirming the summary judgment on the breach of contract and Due Process claims[2] and remand to the Ninth Circuit for consideration of Petitioner's appellate issues raised on those claims.

Respectfully submitted,

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[2]Remand of the breach of contract and Due Process claims is appropriate because the Ninth Circuit, based on it's disposition of the First Amendment claim, declined to decide the issues Mr. May raised on appeal on the contract and due process claims. Remand of the order affirming the jury's verdict is appropriate because evidence concerning plaintiff's termination was excluded from the jury based on the assumption that plaintiff could be lawfully terminated from his Captain position as a policymaker.

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 98-35668
PAUL MAY,	)
	) D.C. No. CV-97-01177-OMP
Plaintiff-Appellant,	)
	)
v.	) MEMORANDUM[1]
	)
NORM HAND; YAMHILL COUNTY, an Oregon Municipal entity,	)
	)
Defendants-Appellees.	)
	)

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

Appeal from the United States District Court
for the District of Oregon

Owen M. Panner, Senior District Judge, Presiding

Submitted July 16, 1999
Portland, Oregon

Before: B. FLETCHER, GOODWIN, and TASHIMA, Circuit Judges.

Paul May, the Appellant, was terminated from his position as a captain with the Yamhill County Sheriff's Office ("YCSO") after running as a candidate for the office of Yamhill County Sheriff and losing the election to Norm Hand. On February 20, 1997, the new sheriff informed May that he was reorganizing the YCSO, and that his position was being eliminated effective March 31. After some negotiation, May agreed to accept a position as a corrections officer with the County, while expressly reserving his right to challenge his termination. May filed suit in federal district court and the district court granted summary judgment in favor of Defendants on all but one claim and a jury ruled in favor of the Defendants in the remaining claim. On appeal, May claims that his termination violated the First Amendment and the Due Process Clause[2] and that the district court erred with respect to a number of evidentiary rulings. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review

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[2]May also raises a breach of contract claim which turns on the same analysis of "just cause" protections as his due process claim.

the district court's grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

As a matter of law, the district court did not err in holding that the undisputed duties exercised by May made him a "policymaker". The Supreme Court has made it clear that the First Amendment will not protect all public employees from the whims of political patronage. In two cases, *Elrod v. Burns*, 427 U.S. 347, 366-7 (1976), and *Branti v. Finkel*, 445 U.S. 507, 517 (1980), the Court made it clear that public employees who qualify as "policymakers" may be terminated for political reasons without violating the First Amendment.[3] The essential inquiry is "not whether the label 'policymaker' or 'confidential' fits a particular

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[3]Although the discharged employees in both *Elrod* and *Branti* were fired because of their political affiliations, this court has extended the *Elrod-Branti* exception to "political loyalty" cases where an employee runs against his supervisor. *See Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); *Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991) (terminated deputy district attorney ran against his supervisor's chosen successor); *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) (applying *Elrod-Branti* analysis where a sheriff retaliated against his lieutenant for running against him); *accord Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (en banc) (applying *Elrod-Branti* analysis where sheriff's deputies dismissed after supporting sheriff's opponent), *cert. denied*, 118 S. Ct. 881 (1998).

position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

The Ninth Circuit has elaborated on the Supreme court's standard and held that "some factors to be considered when determining whether a job is a policymaking position are: vague and broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of the policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." *Fazio v City and County of San Francisco*, 125 F.3d 1328, 1334 (9th Cir. 1997). The Ninth Circuit has held that even a private attorney who participated in strategy sessions, held privileged personnel meetings and represented a municipality in public settings was a policymaker. *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 997 (9th Cir. 1999).[4]

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[4]A number of other circuits have found that deputy sheriffs had sufficient autonomy and proximity to the sheriff's role to be policymakers. *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997) (sheriff may dismiss deputies either because of party affiliation or campaign activity because either "serves as a proxy for loyalty to the sheriff"); *Upton v. Thompson*, 930 F.2d 1209, 1215-17 (7th Cir. 1991) (discussing cases treating loyalty as a crucial qualification for sheriff's deputies); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (holding that the "loyalty to the individual sheriff and the goals and policies he seeks to implement" is

In this case, May was one of three YCSO captains, a position only one step removed from the sheriff. May was responsible for the training and supervision of 24 YCSO employees, contributed to discussions regarding management and policy, and represented the Sheriff before the Board of Commissioners and in the Community. May also attended regular executive meetings with the sheriff and key personnel, was responsible for grant administration and represented the Sheriff's Office in labor grievances. On the basis of these undisputed facts regarding May's duties, the district court did not err in holding that May was a "policymaker" within the meaning of the *Elrod-Branti* exception. Therefore, May could be dismissed for his political activities by Sheriff Hand without running afoul of the First Amendment.

May also appeals the district court's summary judgment denial of his due process claim. May claims that his termination deprived him of a property interest without adequate procedural due process.

In the employment context, as a general matter, a property interest protected by the Due Process Clause will be found where an employee cannot be terminated except for "just cause." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Employees who enjoy "just cause" protections are entitled to pretermination notice and hearing. *See id.* at 542. Under Oregon law, absent a statute, rule, regulation, or contractual term to the contrary, sheriff's deputies are "at will" employees. *See* O.R.S. §

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an appropriate requirement for deputies).

204.601(2); O.R.S. § 204.635(1); *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998). The Oregon Supreme court, however, has recognized that this "at will" status can be modified by counties by the adoption of personnel rules creating due process or "just cause" requirements. *See Graves v. Arnado*, 768 P.2d 910, 912 (Or. 1989).

May argues that he enjoyed "just cause" protections as a YCSO captain, pointing to a Yamhill county policy known as Board Order 88-96, which provides for notification of charges in writing and the opportunity to respond to charges. The policy on its face is replete with procedural protections, although it does not specifically include "just cause" language. May introduced testimony from the County Personnel Officers suggesting that the County viewed Board Order 88-96 as continuing the prior County policy, which expressly extended "just cause" protections to employees like May. Be that as it may, even if May were a "just cause" employee for some purposes, the most that he would be entitled to under the circumstances of his termination was to show in a pretermination hearing that he was not a "policymaker". Since we find, as a matter of law, that May was a "policymaker" this question has been heard and resolved.

May also challenges several of the district court's rulings handed down during the trial of his promotional opportunities claims. The district court's evidentiary rulings are reviewed for an abuse of discretion. *See Fireman's Fund Ins. v. Alaskan Pride Partnership*, 106 F.3d 1465, 1467 (9th Cir. 1997). Erroneous rulings will support a new trial only where

they are not harmless. *See id.* The formulation of jury instructions is reviewed for an abuse of discretion, as are responses to jury inquiries. *See id.* at 1469; *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997). In a civil case, however, we may not review a jury instruction unless the aggrieved party raised an objection below. *See Larez v. City of Los Angeles*, 946 F.2d 630, 638 (9th Cir. 1991).

The district court excluded the testimony of Tammi McLaughlin, who was prepared to testify that Sheriff Hand questioned her during an interview regarding her loyalty to May. The district court ruled that this evidence, although marginally relevant, would be substantially more prejudicial than probative. *See* Fed. R. Evid. 403. Having reviewed the record, we conclude the district court did not abuse its discretion. In any event, even if erroneous, the error would appear to be harmless, as it does not appear that this testimony was central to May's claim.

May also challenges the district court's ruling excluding evidence regarding Sheriff Hand's treatment of Larry Hailey. The district court based this ruling on the fact that Hailey's claims had not survived summary judgment and that the treatment of Hailey should not be admitted to show unfair treatment of May. May opposed this evidentiary ruling only insofar as it would have prevented him from putting Hailey on the stand to testify regarding statements that Sheriff Hand made regarding May. Notwithstanding the district court's ruling, May put Hailey on the stand and had the opportunity to put this evidence before the Jury. May has not identified any additional testimony that he was unable to introduce, and thus has not demonstrated

that the district court's ruling constituted an abuse of discretion.

The third challenged evidentiary ruling relates to the exclusion of an expert witness, retired Corrections Supervisor Hostetler, who was prepared to testify that employing a former captain as a corrections officer was "demeaning." The district court ruled that this testimony, even if marginally relevant, was substantially more prejudicial than probative. *See* Fed. R. Evid. 403. Because the claims tried ran to the denial of promotions, rather than to May's being offered the position as a corrections officer, it does not appear that the district court abused its discretion in excluding this evidence.

The fourth evidentiary ruling that May challenges relates to the exclusion of evidence regarding a conversation between Sheriff Hand and County Commissioner Thomas Bunn. May sought to introduce testimony suggesting that Sheriff Hand was initially opposed to offering May even the corrections officer position, and that he did not capitulate until two county commissioners came to May's defense. This evidence was not directly relevant to his treatment in connection with later promotional opportunities. Therefore, the district court did not abuse its discretion in excluding the testimony.

Finally, May challenges the district court's response to two jury inquiries. After retiring to deliberate, the jury sent out two questions. In response, the district court reinstructed the jury regarding the fact that May's termination was proper and not before them. To the extent May challenges

this instruction as erroneous, we are precluded from reaching the question because May failed to object to the instruction before the district court. *See Larez*, 946 F.2d at 638. In fact, after hearing the court's proposed response, May's counsel expressly stated, "No objection."

May also relies on the jury's questions to demonstrate the prejudice that he claims resulted from the erroneous evidentiary rulings. We are not persuaded by this argument. If anything, the jury questions indicate that, despite the court's instructions, the jury was considering the circumstances surrounding May's termination in ruling on the promotions claim. If anything, the error in instructing the jury appears to have redounded to May's benefit, as the jurors were apparently considering the possibility that his termination might have raised an inference of retaliation.

At root, May argues that the grant of summary judgment as to his termination claims prejudiced his ability to put on his case on the denial of promotional opportunities. We disagree. His promotional opportunities claims were legally separable from his termination claims, and, having reviewed the record, we are satisfied that the bifurcation of this case (resulting from the partial grant of summary judgment) did not substantially prejudice his ability to litigate the promotional opportunities issues.

For the reasons discussed above, we AFFIRM.

FILED
March 24, 2000

Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 98-35668
PAUL MAY,	)
	) D.C. No. CV-97-01177-OMP
Plaintiff-Appellant,	)
	)
v.	) ORDER
	)
NORM HAND, YAMHILL COUNTY, an Oregon Municipal entity,	)
	)
Defendants-Appellees.	)
	)

Before: GOODWIN, B. FLETCHER AND TASHIMA, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Tashima voted to deny the petition for rehearing en banc and Judges Goodwin and B. Fletcher so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

FILED

1998 May 12 A 11:35
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON
BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL MAY,	)	
	)	
Plaintiff,	)	CV 97-1177-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL COUNTY, an Oregon Municipal entity,	)	OPINION
	)	
Defendants.	)	

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Plaintiffs Paul May and Larry Hailey bring these actions against defendants Yamhill County and Yamhill County Sheriff Norm Hand. Plaintiffs, former captains in the Yamhill County Sheriff's Office (YCSO), contend that defendants violated their constitutional rights by eliminating their positions because of their political opposition to Hand. Defendants move for summary judgment in each case. I grant the motion in its entirety in the Hailey case. The motion in the May case is granted in part and denied in part.

BACKGROUND

In the fall of 1996, May and Hailey held two of three captain positions in the YCSO. May ran for Sheriff against defendant Norm Hand in a November 1996 election. Hailey supported May. Hand won and assumed office in January 1997.

Hand restructured the YCSO. He eliminated May's and Hailey's captain positions and created the new position of undersheriff. Immediately thereafter, both plaintiffs began working as corrections deputies where they remain employed.

STANDARDS

The court should grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

law. Fed R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 856 F.2d 1539, 1542 (9th Cir.), cert denied, 493 U.S. 809 (1989).

The substantive law governing a claim determines whether a fact is material. T. W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of a material factual issue against the moving party. Id. at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-31.

DISCUSSION

I. First Amendment Claims - Elimination of Captain Positions

Plaintiffs contend that Hand eliminated their captain positions because of their political opposition to Hand in the sheriff's election. Defendants argue that plaintiffs occupied policymaking positions, termination of which may be politically motivated.

Generally, a public employee's claim for violation of his or her First Amendment rights is analyzed under Pickering v. Board of Educ., 391 U.S.

563 (1968). However, a different analysis applies for "policymaking" employees. Branti v. Finkel, 445 U.S. 507, 517 (1980); Elrod v. Burns, 427 U.S. 347, 372 (1976). Under Elrod-Branti, elected administrators have discretion to consider political affiliation in filling high-level confidential policymaking positions. Id.; Lumpkin v. Brown, 109 F.3d 1498, 1501 (9th Cir. 1997).

A number of courts, including Magistrate Judge Jelderks for this court, have concluded that Elrod-Branti applies to relationships between sheriffs and their deputies. See, e.g., Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir. 1997) (en bank) (office of deputy sheriff was that of a policymaker and was the alter ego of the sheriff; Elrod-Branti applied), cert. denied, 118 S. Ct. 881 (1998); Slyter v. Noelle, No. CV-96-783-JE, Opinion at 11-13 (D. Or. June 27, 1997) (new Multnomah County Sheriff's elimination of chief deputy sheriff's position did not violate First Amendment under Elrod-Branti).

Plaintiffs argue that Elrod-Branti applies only to at-will employees which, according to plaintiffs, they were not. I do not reach this argument because, as discussed below in connection with the procedural due process claims, I conclude that plaintiffs are at-will employees. Plaintiffs also argue that Hand is not entitled to summary judgment because Elrod-Branti applies only to the "hiring authority" which, they maintain, Hand was not because all hiring decisions in Yamhill County are made by the Board of County Commissioners.

As support for this argument, plaintiffs rely on a single passage from Branti in which the court was

discussing the nature of a "policymaker." Branti, 445 U.S. at 518. Plaintiffs cite no cases, and I have found none, holding that Elrod-Branti applies only to the person or public body actually executing the personnel decision as opposed to the person or public body making the recommendation for that decision. Without additional authority, I reject plaintiffs' argument.

Assuming *arguendo* that Hand's elimination of the captain positions was politically motivated, defendants argue that plaintiffs occupied policymaking positions which could be eliminated for political reasons without violating the First Amendment. In his position as Support Services Captain, May was responsible for a broad range of activities within the YCSO. He appeared before the Board of County Commissioners on a variety of matters. He was ultimately responsible for the development and implementation of a policy manual. He supervised approximately twenty-four regular employees and volunteers, including sergeants. He had authority to discipline anyone in his division. He represented the YCSO in all labor grievance matters. The only higher ranking person in the YCSO was the Sheriff himself.

In his position as Field Operations Captain, Hailey had a variety of high level functions within the department. He was responsible for the administration and supervision of all functions within the operations division. He regularly met with the Sheriff and the other two captains to discuss management and policy issues. He supervised approximately forty-five people and had full authority to discipline members, including sergeants. He

frequently represented the sheriff before county commissioners and in the community. The only higher ranking person in the YCSO was the Sheriff himself.

As the Ninth Circuit recently noted, the term "policymaker" "does not mean 'one who makes policy[]' . . . but refers to a position in which political considerations are 'appropriate requirement[s] for the effective performance of the public office involved.'" Fazio v. City and County of San Francisco, 125 F.3d 1328, 1333 (9th Cir. 1997) (quoting Branti, 445 U.S. at 519), cert. denied, 1998 WL 73024 (U.S. Apr. 20, 1998). Factors to consider when determining whether a position is a "policymaking" one include "'vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.'" Id. (quoting Hall v. Ford, 856 F.2d 255, 262 (D.C. Cir. 1988)).

Plaintiffs do not challenge defendants' factual assertions about the positions' duties and I reject plaintiffs' argument that Yamhill County cannot have any policymaking positions because it prohibits employees from engaging in political activity on the job. The cases make clear that determination of a "policymaker" is a functional analysis examining the duties of the position; engagement in political activity is not dispositive.

Under the undisputed facts, plaintiffs' captain positions were "policymaking" positions as that term is

defined in Fazio. I grant defendants' motions on these First Amendment claims.

II. Due Process Claims

Although plaintiffs raise both substantive and procedural due process claims, the substantive due process claims are equivalent to the First Amendment claims discussed above and need no separate analysis. See, Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996) (en banc) (scope of substantive due process does not extend to circumstances already addressed by other constitutional provisions).

"A government employee is not entitled to due process based on deprivation of property, when removed from a position, unless the employee has a 'legitimate claim of entitlement' to the position." Weisbuch v. County of Los Angeles, 119 F.3d 778, 780 (9th Cir. 1997) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). "To determine whether an entitlement exists, a court looks to 'existing rules and understandings that stem form an outside source such as state law." Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 475 (9th Cir 1991) (quoting Roth, 408 U.S. at 577.

Oregon statutes create at-will employment relationships for county sheriff's deputies. See, Or. Rev. Stat. (ORS) 204.601(2) (county deputies and employees paid from county funds hold office during the pleasure of the appointing officer); ORS 204.635(1) ("sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff."). However, county personnel policies may,

consistent with ORS 204.601 and ORS 204.635, impose conditions of "just cause" on a sheriff's authority to terminate the employment of deputy sheriffs. Graves v. Amado, 307 Or. 358, 360, 768 P.2d 910, 911 (1989). The parties dispute whether Yamhill county's personnel policies create a just cause dismissal standard.

The county's 1988 personnel policies, the operative policies in this case, contain no "just cause" language. Those policies state that "[e]mployees outside the county's bargaining units may be disciplined or discharged for failure to fulfill their responsibilities as employees. . . . ." Defts' Exh. A to Mikami Affid.

Defendants argue that the 1988 personnel policies contain no "cause" type language required to create a protected property interest. I agree. A "failure to fulfill his or her duties" discipline or termination standard is too broad and amorphous to be considered "just cause."

In addition, even if the 1988 personnel policies contained the express "just cause" words, a recent Ninth Circuit case indicates that there is no protected property right because of a disclaimer in the 1989 employee handbook. In Lawson v. Umatilla County, Nos. 96-36060, 97-356634, 1998 WL 117866 (9th Cir. Mar. 18, 1998), the court held that because the defendant's personnel policies contained a disclaimer stating that the policies did not create a contract, the plaintiff did not, under Oregon law, possess a property interest in continued employment, despite the fact that the personnel policies also limited the grounds for

discipline or discharge to "cause." Id. at *3. The employee handbook in this case contains a similar disclaimer. Defts' Exh. B to Mikami Affid.

Here, evidence supports construing the employee handbook as a supplement to the 1988 personnel policies. See Defts' Exh. 4 (Mikami Affid.) at 2 (stating that the employee handbook "supplements the [County's] Policy and Procedure Manual"); Defts' Exh. C to Mikami Affid. (handbook itself states that it is intended to serve as "guidelines regarding county policy, procedure, ..."). So construed, Lawson holds that the disclaimer negates any "cause" language contained in the 1988 personnel policies.

Plaintiffs argue that a just cause standard exists because (1) there is a history of a just cause standard in Yamhill County; (2) promises of a just cause standard were made to May; and (3) Oregon Revised Statutes create a just cause standard for police officers. I reject these arguments for the following reasons.

The history of county policy does not create a material issue of fact as to whether a "just cause" standard existed at the time the captain positions were eliminated. First, what Vasquez learned from county Counsel in 1979 has no bearing on the current policies. Second, Mikami's testimony that in practice, Yamhill County applies a just cause standard to nonbargaining unit employees is not relevant because first, he admits that he is unaware of any nonbargaining unit employee getting very far in the disciplinary process and thus, he has had no opportunity to apply any standard to such employees, and second, his understanding of a practice cannot contradict the clear

language of the policies.

Third, Krawczyk admits that the 1988 personnel policies were intended to replace the previous policies. As noted above, there is no just cause language in the 1988 policies. Whether Krawczyk intended to eliminate the previous policy's just cause provision is irrelevant in the face of the unambiguous language of the 1988 policies. Fourth, the 1995 YCSO policies expressly state that county policies are only to provide additional information, consistent with the county's policies. Moreover, although the word "cause" is used to describe the possible bases for discipline, it is not a "just cause" standard. Rather, the wording is broad, with the only limit to the definition of "cause" being the Sheriff's or a supervisor's imagination.

As to promises made to May, evidence suggests that any such promises were made only in regard to retirement benefits in the wake of Ballot measure 8 prohibiting public employers from continuing to make the employee "pick-up" contribution to the public employee retirement system. See, e.g., Pltfs' Exh. N (Lopuszynski Depo.) at 5 (benefits only example of effort to treat non-bargaining unit and bargaining unit staff alike); Pltfs' Exh. 4 to Hailey Affid. (document indicating that Yamhill county to treat bargaining unit and nonbargaining unit staff alike expressly states that it relates solely to the retirement system contribution as a result of Ballot Measure 8).

Additionally, even if such a promise were made to May, and somehow this carried over to Hailey as well, it would have been made without authority and

cannot bind Yamhill County. See, e.g., Butler v. Portland Gen. Elec. Co., 748 F. Supp. 783, 792-93 (D. Or. 1990) (Judge Frye noting that an implied contract containing a just cause standard cannot be created by mere casual or unauthorized comments), aff'd, 958 F.2d 377 (9th Cir. 1992); Holdner v. Columbia County, 123 Or. App. 48, 51-52, 858 P.2d 901, 902 (1993) (rejecting plaintiff's argument that county commissioner had apparent authority to bind county to promise made to plaintiff by county commissioner.)

Finally, the statute creating a just cause standard for police officers is irrelevant in this case because it does not apply to supervisory employees like plaintiffs and does not apply when a county has adopted its own personnel policies. ORS 236.370(3) and (6).

I grant defendants' motions on the due process claims.

III. Breach of Contract Claims

Plaintiffs allege that defendants breached their employment contracts by terminating them without just cause. For the reasons stated in the previous section, I grant summary judgment to defendants on these claims because there was no just cause provision in the applicable employment policies.

IV. Age Discrimination - Elimination of Captain Positions

Plaintiffs contend that their captain positions were eliminated because of their age. To establish the

requisite inference of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, plaintiffs must show that: (1) they were members of the protected class; (2) they were performing their jobs in a satisfactory manner; (3) they were terminated; and (4) they were replaced by a substantially younger employee with equal or inferior qualifications. Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994).

At the time the captain positions were eliminated, May was forty years old and Hailey was forty-eight. I assume for the purposes of this motion that they were satisfactorily performing their jobs and that they were terminated. May's duties were assumed by Sheriff Hand and Sergeant Kowalik, both of whom are older than May. Hailey's duties were assumed by Sheriff Hand, who is older than Hailey, and to some extent by Curt Gilbert, who is forty-four years old. Although Gilbert is younger than Hailey, he is not substantially younger. Thus, plaintiffs fail to establish prima facie cases.

Even if plaintiffs could establish prima facie cases, I would still grant summary judgment to defendants on the ADEA claims because plaintiffs fail to create a genuine issue of material fact regarding pretext. Defendants argue that the captain positions were eliminated because of Hand's departmental reorganization. To survive summary judgment, plaintiff must provide enough evidence so that a reasonable factfinder could conclude that this asserted justification is pretextual. See, e.g., Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918 (9th Cir. 1996) (to survive summary judgment, plaintiff must produce

enough evidence to allow a reasonable factfinder to conclude that the alleged reason for the plaintiff's discharge is false or that the true reason was a discriminatory one), cert. denied, 118 S. Ct. 369 (1997). Plaintiffs fail to do so.

The evidence shows that in January and February 1997, Hand conducted a "perception audit" of the sheriff's department to assess the feelings of employees. Detective Larry Pedersbeck made a written statement indicating dissatisfaction by "front line supervisors" regarding older employees being promoted over them. Pltfs' Memo. at 26. Plaintiffs also rely on testimony from Krawczyk that Hand was critical of Hailey's "authoritarian style of management" as causing "erosion of morale." Pltfs' Exh. F at 9.

A reasonable factfinder could not find the requisite pretext from this evidence. The statements are about only Hailey, not May. The statement made by Hand to Krawczyk about Hailey mentions nothing about age and does not establish that Hand relied upon any information from his front line supervisors. At best, it shows that Hand had a belief about Hailey's management style which could have been formed from Hand's own observations of Hailey or from any number of other ways. Finally, even if front line supervisors passed information to Hand, there is no evidence any of them communicated any feelings about age or older workers to Hand. Thus, plaintiffs fail to create a genuine issue of material fact regarding age being a factor in Hand's decision to eliminate the captain positions. I grant summary judgment to defendants on these age discrimination claims.

V. May's Promotional Opportunities

May contends that defendants denied him several promotional opportunities because of his age and in retaliation for his political opposition to Hand. As to the First Amendment retaliation claim, defendants argue Elrod-Branti allows them to consider May's political opposition to Hand in filling job vacancies. Although Elrod-Branti applies to decisions concerning promotions, as to lower-level public employment positions, "promotions [or lack thereof] . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Rutan v. Republican Party of Ill., 497 U.S. 62, 74-75 (1990). Defendants fail to show that any of the promotional opportunity positions at issue here are anything other than lower-level public employment positions for which the Elrod-Branti political patronage analysis is inapposite.

If Elrod-Branti does not apply, then Pickering does. Here, May's political opposition to Hand is a matter of public concern. See Thomas v. Carpenter, 881 F.2d 828, 830 (9th Cir. 1989) (statements made in context of sheriff election were addressed to matter of public concern). Defendants fail to show that May's placement in one of these positions would impair discipline or co-worker harmony, disrupt the workplace, or "have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary[.]" Wheaton v. Webb-Petett, 931 F.2d 613, 618 (9th Cir. 1991). Thus, as to the First Amendment component of these claims, the only issue remaining is whether May was denied the positions because of his political opposition to Hand.

The positions at issue are several temporary corrections sergeant positions, two patrol deputy positions, an assignment for disaster relief in North Dakota, and a patrol deputy position assigned to the Grand Ronde Tribe. May presents no evidence supporting an age discrimination claim for any of these positions. As to the First Amendment claim, however, May states that on the day Hand told him that his captain position was to be eliminated, Hand also told him he was filing an elections complaint against him. May also states that County Commissioner Tom Bunn told him that the elimination of the captain positions was not about money as Hand had asserted and that Hand did not want May and Hailey in the sheriff's organization.

With the exception of the temporary corrections sergeant positions requiring one year of corrections experience and the patrol deputy position for which plaintiff did not score in the top ten of the applicant test, May's evidence is sufficient to create a jury issue as to whether defendants' failure to place him in any of the other positions was in retaliation for May's political opposition to Hand. Defendants argue that because several months passed between the November 1996 election and May's failure to obtain any of these positions, the evidence is insufficient to show retaliation. I disagree. While the lapse of time may go to the weight of the evidence, it does not disprove a retaliatory motive. I grant summary judgment to defendants on the age discrimination components of these claims and on the First Amendment components of the patrol deputy position in which plaintiff did not make the top ten and the temporary corrections sergeant positions requiring one

year of corrections experience. I deny the motion as to the other claims.

CONCLUSION

Defendants' motion in the Hailey case, No. CV-97-1712-PA, (#17) is granted. Defendants' motion in the May case, No. CV-97-1177-PA (#34) is granted in part and denied in part as follows: the motion is granted in all respects except for the following promotional opportunities: the May 1997 temporary corrections sergeant positions (First Amendment basis only); temporary patrol deputy position filled by reserve deputy (First Amendment basis only); disaster relief project in North Dakota (First Amendment basis only); and patrol deputy position for Grand Ronde Tribe (First Amendment basis only).

DATED this 12th day of May, 1998.

s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

FILED

1998 May 12 A 11:35
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON
BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL MAY,	)	
	)	
Plaintiff,	)	CV 97-1177-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL	)	
COUNTY, an Oregon	)	ORDER
Municipal entity,	)	
	)	
Defendants.	)	

Defendants' motion for summary judgment (#34) is granted in part and denied in part as follows: the motion is granted in all respects except for the following promotional opportunities: the May 1997 temporary corrections sergeant positions (First Amendment basis only); temporary patrol deputy position filled by reserve deputy (First Amendment basis only); disaster relief project in North Dakota (First Amendment basis only); and patrol deputy position for Grand Ronde Tribe (First Amendment basis only).

DATED this 12th day of May, 1998.

s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

Entered on the Docket on
6/18/98
DONALD M. CINNAMOND
By mjs

FILED mjs

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CLERK, U.S. DISTRICT COURT
DISTRICT COURT OF OREGON
PORTLAND, OREGON
BY mjs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL MAY,	)	
	)	
Plaintiff,	)	CV 97-1177-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL COUNTY, an Oregon municipal entity,	)	**JUDGMENT OF DISMISSAL**
	)	
Defendants.	)	

PANNER, J.

Based upon the record, this action is dismissed.

DATED this 15th day of June, 1998.

s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

101

(2)

No. 99-2067

Supreme Court, U.S.
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In The
Supreme Court of the United States

PAUL MAY,

Petitioner,

v.

NORM HAND and YAMHILL COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Elected sheriffs in Oregon have statutory authority to appoint their own deputies, who then serve at the pleasure of the sheriff. After Norm Hand was elected Sheriff of Yamhill County, Sheriff Hand decided to reorganize the Sheriff's Office and eliminate certain high-level policymaking positions. Petitioner, who had run against Sheriff Hand in the election for Yamhill County Sheriff, held one of the positions that was eliminated.

1. Did the District Court and the Ninth Circuit properly conclude that the rules developed in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), govern the determination of whether a newly-elected Sheriff violates the First Amendment rights of certain subordinates when the Sheriff decides to change the structure of the Sheriff's Office and eliminate certain policymaking positions?

2. Does the fact that the Board of Commissioners approved the elected sheriff's decision to reorganize the Sheriff's Office, preclude application of the rules from *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to the decision made by a newly-elected Sheriff to change the structure of the Sheriff's Office and eliminate the certain policy-making positions?

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STATEMENT OF THE CASE

In November 1996, Petitioner Paul May ("Petitioner") was a Captain in the Sheriff's Office for Respondent Yamhill County, Oregon ("Yamhill County"). In a 1996 election, Petitioner and Respondent Norm Hand ("Sheriff Hand") ran against each other for the position of Yamhill County Sheriff. Mr. Hand won and took office in January 1997. (CR 36, Ex. 3 at ¶1; CR 46, Ex. O at ¶13)

Before the election, the Yamhill County Sheriff's Office was organized such that there were three captains (Field Operations Captain, Support Services Captain, and Adult Corrections Facility Captain) and two administrative sergeants. Petitioner was Support Services Captain and Larry Hailey, who had supported Petitioner during the election, was the Field Operations Captain. Sheriff Hand wanted to restructure the Sheriff's Office because he believed it was top heavy. Sheriff Hand decided to eliminate the positions of Support Services Captain and Field Operations Captain and distribute their duties between the Sheriff, Administrative Sergeant, Patrol Sergeants, and the newly created position of Undersheriff. Sheriff Hand did not eliminate the two Captains' positions because they were held by Petitioner and Mr. Hailey; Sheriff Hand would have eliminated the positions as part of the restructuring regardless of who held them. Sheriff Hand also did not eliminate the positions in order to discipline Petitioner or Mr. Hailey, as Sheriff Hand had no reason to discipline either of them. (CR 36, Ex. 3 at ¶¶2, 5-6, 11-12; CR 46, Ex. A at ¶3; Ex. O at ¶2 and attached Ex. 1)

In February 1997, Sheriff Hand verbally advised Petitioner and Mr. Hailey that Sheriff Hand was restructuring

the Sheriff's Office and eliminating their positions. Sheriff Hand told both men they could apply for the new position of Undersheriff. Sheriff Hand confirmed in writing that the Captains' positions would be eliminated effective March 31. On March 21, Sheriff Hand notified Petitioner and Mr. Hailey that Sheriff Hand was seeking approval from the Board of Commissioners to create two new certified corrections officer positions to begin April 1, and that if Sheriff Hand got that approval, he would offer the positions to Petitioner and Mr. Hailey.[1] After obtaining approval for the positions, Sheriff Hand offered them to Petitioner and Mr. Hailey, and both accepted. (CR 36, Ex. 1 at 17-18; Ex. 3 at ¶¶7-10 and attached Exs. E-J; CR 46, Ex. A at ¶11; Tran. at 73-74, 175, 189)

Before the effective date of the reorganization, Petitioner's attorney sent a letter to Yamhill County stating that elimination of Petitioner's position would violate his civil rights. Petitioner's attorney stated that County personnel policies had conveyed a property interest in Petitioner's position, and requested that Petitioner be placed on administrative leave while the Commissioners investigated whether Petitioner's constitutional rights were being violated. The Board did not place Petitioner on leave. Instead, the Yamhill County budget committee unanimously approved a new budget that included authorization for the position of Undersheriff and did not include the two Captains' positions. (CR 36, Ex. 1 at 19,

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[1] Petitioner states that Sheriff Hand offered Petitioner a clerical position. (Petition at 5) Petitioner's own Affidavit stated that the offer was from the County after county counsel began negotiating with Petitioner. (CR 46, Ex. O at ¶27)

27-29, 37-38, and Ex. 3 at ¶9)[2] As Support Services Captain, Petitioner was responsible for developing and implementing a Sheriff's Office policy manual. He supervised 24 people and had authority to discipline anyone, including sergeants. Petitioner met regularly with the Sheriff and other captains to discuss management and policy issues, and was involved in budget preparation. Petitioner appeared before the Board of Commissioners on many matters and acted for the Sheriff at some Board meetings. Petitioner was responsible for grant administration and procurement and he represented the Sheriff's Office in labor grievances. The only higher-ranking position was the Sheriff. (CR 36, Ex. 1 at 3-16; Ex. 3 at ¶¶2, 4 and attached Exs. A, B, D; CR 46, Ex. A at 2, 14, 15)

In 1988, the Yamhill County Board of Commissioners adopted Board Order 88-96, a discipline policy that superseded all other discipline policies. In July 1989, the County adopted a Handbook that supplemented Board policies. Sheriff Hand was not required to, and did not agree to, be bound by County personnel policies. Other than collective bargaining agreements, there were no other discipline policies in effect when Sheriff Hand took office. Captains were not members of any collective bargaining unit. (CR 36, Ex. 2 at 2-3 and attached Ex. 2; CR 36, Ex. 3 at ¶¶2, 14; Ex. 4 at ¶¶2-6 and attached Exs. A-C)

Petitioner filed this action alleging that he was discharged without Due Process and in violation of both his First Amendment rights and an alleged employment contract with Yamhill County. (CR 1, 40) The District Court

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[2] Although Petitioner became a corrections deputy on April 1, he was on medical leave at that time. Petitioner began working in corrections on April 15. (Tran. at 79)

granted Respondents' motions for summary judgment on the Due Process and breach-of-contract claims, and on that part of Petitioner's First Amendment claim involving Sheriff Hand's decision to reorganize the Sheriff's Office and eliminate Petitioner's position. The Court ruled that there were issues of fact on that part of Petitioner's First Amendment claim alleging that, after he became a corrections sergeant, he was denied promotional opportunities in violation of his First Amendment rights. (Petition App. at 12a-27a) The promotions claim was tried to a jury, which returned a verdict for Respondents. (CR 99; Tran. at 427-28) The District Court then entered a Judgment dismissing Petitioner's claims. (Petition App. at 30a-31a)

In an unpublished disposition, the Ninth Circuit affirmed the District Court's judgment. (Petition App. at 1a-9a) On the First Amendment claim, the Court focused on the nature of Petitioner's responsibilities as Support Services Captain and held that "[a]s a matter of law, the district court did not err in holding that the undisputed duties exercised by [Petitioner] made him a 'policymaker.' " (Petition App. at 3a, 5a) The Court also stated that the rules from *Elrod-Branti* apply to claims involving "political loyalty" just as they do to claims involving "political affiliation." (Petition App. at 3a, n. 3)

REASONS FOR DENYING THE WRIT

Petitioner failed to present any compelling reason for granting his Petition for Writ of *Certiorari*. The issues presented by the Petition involve whether Sheriff Hand and Yamhill County violated Petitioner's First Amendment rights when, after he was elected, Sheriff Hand

reorganized the Sheriff's Office and eliminated certain policymaking positions. There was no First Amendment violation. Instead, the Ninth Circuit's decision simply followed precedent recognizing that elected officials must be permitted to determine how their own offices will be organized and to select individuals for high-level policymaking and policy-implementing roles who share the goals and views of the elected official.

I.

The Ninth Circuit's ruling was correct and is consistent with the rulings by other Circuit Courts that have correctly applied the *Elrod-Branti* exception.

Petitioner contends that this Court should grant his Petition because the Circuit Courts are divided as to whether the *Elrod-Branti* exception applies to claims such as his and that there is a conflict in how the *Elrod-Branti* exception should be applied. (Petition at 12). When the facts of the cases are considered, there is no confusion and there is not a split among the circuits.

A. The Ninth Circuit's decision correctly applied this Court's precedent.

This Court has established general rules for examining a public employee's claim for violation of his First Amendment rights arising out of discipline or discharge by the public employer. In most circumstances, such claims are evaluated using the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under that test, a court first determines whether the employee's speech involves a matter of public concern. *Id.* at 568. If it does, the court then balances the "interests of the [employee], as a citizen, in commenting upon

matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* A public employee's First Amendment rights are not violated where the interests of the government as an employer outweigh the interests of the employee. *Id.* at 573; *accord Connick v. Myers,* 461 U.S. 138, 151-52 (1983).

However, for certain "policymaking" public employees, the employee may be discharged for political reasons without violating the First Amendment. *Branti v. Finkel,* 445 U.S. 507, 517 (1980); *Elrod v. Burns,* 427 U.S. 347, 367-68 (1976) (plurality). An employee for whom the employer can "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" can be discharged for his political position without violating the First Amendment. *Branti,* 445 U.S. at 518.

In this case, assuming that Petitioner could somehow establish that Sheriff Hand's decision to reorganize the Sheriff's Office and eliminate certain policymaking positions was based on the fact that Petitioner had run for election against Sheriff Hand, Respondents established that political considerations are appropriate requirements for effective performance of the position of Support Services Captain. Petitioner's own deposition (CR 36, Ex. 1) demonstrated that he was responsible for several discretionary and policymaking functions, which are the very types of functions for which the Sheriff is entitled to demand loyalty to his views. Petitioner was responsible for developing and implementing a Sheriff's Office policy manual. He met regularly with the Sheriff and other captains to discuss management and policy issues, and he was involved in budget preparation. Petitioner appeared

before the Board of Commissioners on many matters and acted for the Sheriff at some Board meetings. Petitioner supervised 24 people and had authority to discipline anyone, including sergeants. He also represented the Sheriff's Office at labor grievances. Thus, Petitioner had a variety of high-level functions within the Sheriff's Office that involved both making and implementing policy. Under those facts, the Ninth Circuit correctly affirmed the District Court's ruling that the position of Support Services Captain was the type of position for which Sheriff Hand could make hiring decisions involving political loyalty without violating Petitioner's First Amendment rights.

B. The Ninth Circuit's decision is consistent with prior Ninth Circuit precedent and with case law from other Circuits law applying the *Elrod-Branti* exception.

In resolving this case, the Ninth Circuit applied its own precedent addressing the policymaker issue. *See* Petition App-4a, discussing *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). In *Fazio*, the Court allowed to stand the dismissal of an assistant District Attorney who was discharged after campaigning against the current District Attorney. The Ninth Circuit discussed the analysis for determining what roles fit within the *Elrod* and *Branti* exception:

> Under the rationale in *Branti*, a public employee need not literally *make* policy in order to fit within the *Elrod* policymaker exception. Rather, an employer may fire a public employee for purely political reasons if the employer can demonstrate that political considerations are

> "appropriate requirement[s] for the effective performance" of the job.

125 F.3d at 1332 (emphasis in original), *quoting Branti*, 445 U.S. at 518. The Court further explained that

> [a] public agency would be unmanageable if its head had to . . . retain his political enemies . . . in positions of confidence or positions in which they would be . . . exercising discretion in the implementation of policy.

Fazio, 125 F.3d at 1333, *quoting Wilbur v. Mahan*, 3 F.3d 214, 217 (7th Cir. 1993). Finally, the Ninth Circuit identified some factors to be considered in determining whether the employee's role fits within the exception:

> vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.

Id. at 1334, n. 5.

Application of the *Fazio* factors to the position of Support Services Captain demonstrates that the Ninth Circuit correctly affirmed the District Court's application of the *Elrod-Branti* exception. Petitioner had very broad responsibilities that encompassed developing and enforcing policy. He had power to control others in that he supervised 24 people and had authority to discipline them. He had authority to speak in the name of the Sheriff at Board meetings and at union grievances. His position as Captain was viewed by the public as a high-level position, and he had significant influence on programs and grant applications for the Sheriff's Office. He routinely had contact with the Sheriff and the Board, and worked with other Captains in developing policy for the Sheriff's Office.

Like the Ninth Circuit, other Circuits have concluded that the *Elrod-Branti* exception applies not only to the relationships between sheriffs and captains, but even to the relationships between sheriffs and certain types of deputies. In *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the new sheriff refused to reappoint existing deputy sheriffs, clerks, jailers, or process servers. Although the Eleventh Circuit did not agree that all of the positions fit within the *Elrod-Branti* exception, the Court did hold that "loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff." 866 F.2d at 377. The Court described the deputies in *Terry* as the "alter ego" of the sheriff and reasoned that the "closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." *Id.*; *accord Cutcliffe v. Cochran*, 117 F.3d 1353, *reh'g denied*, 128 F.3d 1465 (11th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998).

The Seventh Circuit has reached similar conclusions. In *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir.), *cert. denied*, 510 U.S. 861 (1993), and *Upton v. Thompson*, 930 F.2d 1209, 1282, *reh'g denied*, 938 F.2d 84 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), the Seventh Circuit held that political affiliation is an appropriate requirement for a deputy sheriff because a sheriff's political fortunes are closely tied to the job performance of his deputies. That Court has recognized that deputies "operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Dimmig*, 983 F.2d at 87.

Similarly, the Fourth Circuit, sitting *en banc* in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522

U.S. 1090 (1998), stated that "the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable." 119 F.3d at 1164. The *en banc* Court held that the *Elrod-Branti* exception applied to deputies who campaigned for the sheriff's opponents and that those deputies "had no constitutional right to continued employment after the election." *Id.* The court added:

> We can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff, and thus actual or potential disloyalty once the candidate takes office, than to actively campaign for the candidate's opponent. That is the exact measure employed by Sheriff Medford in this case. The deputies admit that they campaigned on behalf of Medford's opponents. "It was never contemplated that . . . sheriffs . . . must perform the powers and duties vested in them through deputies or assistants selected by someone else," and we do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.

Id. at 1164-65 (footnotes omitted); *accord Joyner v. Lancaster*, 815 F.2d 20, 22-24 (4th Cir. 1987), *cert. denied*, 484 U.S. 830 (1987) (captain who helped with departmental planning and supervised deputies was implementing sheriff's policies and could be discharged for campaigning for sheriff's opponent).

C. Decisions within the Ninth Circuit are not inconsistent in the application of the *Elrod-Branti* exception.

Petitioner contends that decisions within the Ninth Circuit on the applicability of the *Elrod-Branti* exception are "seriously divided." He relies on *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir.), *cert. denied*, 502 U.S. 818 (1991); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990), and *Fazio, supra*, to support that argument. (Petition at 14-15) Those cases are not inconsistent.

As discussed above, in *Fazio*, the Ninth Circuit upheld the dismissal of an assistant district attorney on the ground that his position was a policymaking one. The Ninth Circuit reaffirmed the importance of allowing the head of a public agency to run his or her department by placing persons loyal to the agency head's views into positions involving the exercise of discretion and the implementation of policy. 125 F.3d at 1333.

In *Finkelstein*, a District Attorney suspended the plaintiff, a deputy district attorney, for unlawfully accessing confidential personnel files to obtain information about a second deputy district attorney against whom the plaintiff was running for office. When the confidential information leaked, the District Attorney assumed that the plaintiff was responsible and suspended him without an opportunity to deny the charges. The Ninth Circuit held that the District Attorney was entitled to qualified immunity because it was not clearly established that the plaintiff was protected from disciplinary action based on his candidacy. 924 F.2d at 1453. This Court too has recognized that the position of a district attorney might be different than that of a public defender. *Branti*, 445 U.S. at 519 n. 13.

Contrary to Petitioner's argument, the Ninth Circuit's decision in *Thomas v. Carpenter, supra,* is not inconsistent with *Fazio* or *Finkelstein*. In *Thomas,* the plaintiff, a lieutenant in the sheriff's department, was relieved of certain duties after he unsuccessfully ran for election against the sheriff. The district court granted a motion to dismiss the complaint based on the *Elrod-Branti* exception. The Ninth Circuit reversed. However, it is important to focus on the stage of the proceedings and the nature of the position involved. The Ninth Circuit was reviewing a ruling on a motion to dismiss. The Court held *only* that the sheriff could not show, based *solely* on the allegations of the plaintiff's complaint, that political loyalty was "essential to the effective performance of the tasks removed from his list of responsibilities." 881 F.2d at 832. The plaintiff had alleged that he was not responsible for developing departmental policy. It was under those circumstances that the Court addressed the *Pickering* balancing test. However, the Ninth Circuit also stated that the defendant might be able to prove at trial or through summary judgment that political loyalty was needed for the effective implementation of departmental policy for each of the positions held by the various plaintiffs. *Id.* Thus, *Thomas* addressed *only* the question whether the plaintiff had stated a claim. Nothing in *Thomas* is inconsistent with *Finkelstein* or *Fazio,* and nothing in any of those decisions mandates that Petitioner's claim should have been analyzed under *Pickering*.[3]

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[3] Petitioner also relies on a district court decision, *Meek v. County of Riverside,* 982 F. Supp. 1410 (C.D. Cal. 1997), *aff'd in part, dismissed in part,* 183 F.3d 962 (9th Cir.), *cert. denied,* 120 S. Ct. 499 (1999). Like *Thomas, Meek* involved a ruling on a motion to dismiss. For jurisdictional reasons, the Ninth Circuit did not address on appeal the propriety of the District Court's

D. Decisions from the Fourth Circuit do not demonstrate a division within that Circuit on the application of the *Elrod-Branti* exception.

Petitioner contends that a series of decisions in the Fourth Circuit demonstrate the lack of clarity in this Court's rulings on the application of the *Elrod-Branti* exception to the *Pickering* balancing test. Petitioner relies on *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), *Joyner v. Lancaster, supra*; and *Jenkins v. Medford, supra*. (Petition at 14)

In *Jones v. Dodson*, the Fourth Circuit employed the *Pickering* balancing test after making a sweeping statement that the Court did not believe the duties of deputy sheriffs, "no matter what the size of the office, or the specific position of power involved" could ever be found to involve policymaking related to partisan political interests or to involve access to confidential information involving partisan political concerns. 727 F.2d 1329. Three years later, the Fourth Circuit again evaluated a discharged employee's First Amendment claim under the *Pickering* balancing test, and did not address the effect of this Court's decisions in *Elrod* and *Branti*. *See Joyner v. Lancaster*, 815 F.2d at 22-23. Thereafter, in *Jenkins v. Medford*, the Fourth Circuit, sitting *en banc*, applied the *Elrod-Branti* analysis and upheld the dismissal of a deputy sheriff who performed policymaking functions and who had run for office against the elected sheriff. *Jenkins*, 119 F.3d at 1164. In doing so, the Court focused on the specific roles of the sheriff and his deputies, noting the important policymaking and policy implementation functions of the deputies at issue. *Id.* at 1163-64. The *en banc* Fourth

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analysis. Absent Ninth Circuit review, the District Court's decision in *Meek* does not establish a conflict that this Court should address.

Circuit also addressed both *Jones* and *Joyner*. With respect to *Jones*, the *en banc* Court rejected the broad statement that deputy sheriffs never can be policymakers and, instead, required district courts to examine the specific position at issue to determine whether the role fits within the *Elrod-Branti* exception. *Id.* at 1164. As to *Joyner*, the Court stated that the reason the court had focused on *Pickering* was because the case addressed a deputy whose activities had indeed caused disruption in the workplace. *Id.* at 1161.

The decision in *Jenkins* does not reflect a split within the Fourth Circuit. Instead, *Jenkins* is the end result of the progressive development of the law, culminating in the recognition that the *Elrod-Branti* analysis should be applied to deputy sheriffs who occupy policymaking and important policy implementation roles. In such cases, loyalty to the positions held by the elected official are indeed important requirements for the effective performance of the public office involved. *Jenkins*, 119 F.3d at 1164.

E. The decisions from other Circuits do not demonstrate confusion that justifies granting the Petition.

Petitioner contends that other Circuits have struggled with the application of *Elrod-Branti* to cases involving issues similar to those in this case. Petitioner relies on *Burns v. County of Cambria, Pa.*, 971 F.2d 1015 (3rd Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Upton v. Thompson*, *supra; Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988); and *Terry v. Cook*, *supra*. (Petition at 16) When the facts of those cases are considered, it is clear that they are not inconsistent.

In *Burns v. County of Cambria*, the Third Circuit addressed the applicability of the *Elrod-Branti* exception

to deputy sheriffs whose duties were limited to three tasks: serving process; transporting prisoners to and from court, and providing courtroom security. 971 F.2d at 1022. The Court concluded that the defendants failed to demonstrate how political alignment between the sheriff and deputies is relevant to the performance of such limited duties. *Id.* In doing so, the Third Circuit distinguished the nature of the duties involved in *Burns* from those in cases in which the Court had recognized a right to demand political loyalty. *Id.* at 1023.[4]

A similar analysis was applied in the Tenth Circuit. In *Dickeson v. Quarberg, supra*, the Tenth Circuit concluded that the head jailer and an administrative assistant, neither of whom were sworn deputies, could not be discharged by a newly-elected sheriff merely because they had supported the sheriff's opponent during the election. 844 F.2d at 1443-44. The nature of the duties of both employees explain that outcome. As the head jailer, one of the plaintiffs prepared work schedules, ordered food, planned menus, prepared meals, and supervised four jailers in housing and feeding prisoners. For the other plaintiff, an administrative assistant, ninety percent of her duties were secretarial and, although her work caused her to come across some confidential papers, the Court concluded that her role was such that political loyalty was not an appropriate requirement for the job.

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[4] *Citing Brown v. Trench*, 787 F.2d 167, 170 (3rd Cir. 1986) (elected county commissioners could require shared political beliefs from assistant director of public information whose duties included writing press releases and acting as a spokesperson for commissioners); *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981) (mayor had a right to complete cooperation and loyalty from city solicitors who performed functions "intimately related to city policy").

844 F.2d at 1443 and n. 7; *accord Terry v. Cook*, 866 F.2d at 377-78.

On the other side are *Upton v. Thompson*, *supra*, and *Terry v. Cook*, *supra*. In *Upton*, the Tenth Circuit held that political considerations were appropriate for employment decisions involving deputy sheriffs because of the autonomy and discretionary authority exercised by deputies. 930 F.2d at 1218. The Court noted that the deputies at issue were "vested with substantial discretionary authority in the implementation of the policy goals" of the elected sheriff, which made them suitable for treatment similar to that of an assistant prosecutor or deputy city commissioner. *Id.* at 1215.

The Eleventh Circuit also has recognized the appropriateness of political considerations in connection with deputy sheriffs who have policymaking and discretionary authority. As discussed above, in *Terry v. Cook*, *supra*, the Eleventh Circuit affirmed the dismissal of claims by deputy sheriffs but not other employees, all of whom alleged that they were discharged for political reasons. 866 F.2d at 377. The newly-elected sheriff, who had campaigned on a platform that promised a change in administration and to replace all employees, refused to reappoint deputy sheriffs, clerks, investigators, dispatchers, jailers, and process servers. *Id.* at 374. The Eleventh Circuit upheld the refusal to reappoint the deputy sheriffs because, unlike the other employees, the deputies had to perform the powers and duties of the sheriff. The Court concluded that, under those circumstances, closeness and cooperation were absolutely necessary and the sheriff must retain absolute authority over the deputies' appointments. *Id.* at 377.

Thus, the Circuit Courts have recognized that the applicability of the *Elrod-Branti* exception depends on the

circumstances of each case. In this matter, the role of Support Services Captain involved a much higher level of responsibility, discretionary authority, and policymaking functions than the roles in *Burns* and *Dickeson*. Instead, the duties make this case fall into the categories recognized in *Upton* and *Terry*. Although Petitioner challenges the lower courts' focus on the specific nature of his role as Support Services Captain, both courts properly considered whether the duties to be performed made Petitioner's loyalty to Sheriff Hand's goals and views a proper consideration in Petitioner's employment.

F. Plaintiff cannot establish a split among the circuits that justifies granting *certiorari* in this case by relying on a Fifth Circuit decision that erroneously applied this Court's First Amendment decisions.

Petitioner contends that the Fifth Circuit's decision in *McBee v. Jim Hogg County, Tex.*, 703 F.2d 834 (5th Cir. 1983), *on reh'g*, 730 F.2d 1009 (5th Cir. 1984) (*en banc*), demonstrates a conflict among the Circuits. (Petition at 15) However, that decision is based on an erroneous construction of this Court's decision in *Connick*. The fact that another Circuit errs in its application of this Court's decisions should not be a basis for reviewing this case.

In *McBee*, the newly-elected sheriff declined to reappoint some of his predecessor's employees, including five deputy sheriffs. After ruling that the *Elrod-Branti* exception applies equally to claims based on personal support for a candidate as they do to claims based on party affiliation, the district court concluded that there was no showing that political loyalty was an appropriate qualification for the position of deputy sheriff. 730 F.2d at 1010. A panel of the Fifth Circuit reversed, holding that the *Elrod-Branti* exception applied because of the "close

working relations and mutual confidence demanded by service in a small county office." *Id.* at 1011. The *en banc* Fifth Circuit vacated the panel's decision, ruling that, under the then-recent decision in *Connick v. Meyers*, the issue must be decided under *Pickering*, not *Elrod* and *Branti*. *McBee*, 730 F.2d at 1013. In doing so, the *en banc* Court misapplied this Court's decision in *Connick*.

In *Connick*, this Court addressed the claim of an assistant district attorney who was discharged after circulating a questionnaire raising issues about internal office policy and whether other assistants felt pressured to work in political campaigns. The questionnaire came on the heels of the plaintiff's challenge to a decision by her superiors to transfer her to another part of the office. Nothing in that case involved political loyalty to political affiliation. 461 U.S. at 141. Therefore, this Court resolved the plaintiff's claim under the *Pickering* analysis. *Id.* at 146-48. In doing so, this Court did not invalidate *Elrod* or *Branti*, and did not limit their holdings in cases that do involve political loyalty or political affiliation. This Court did not apply *Elrod* and *Branti* because the facts in *Connick* did not call for such an application.

In *McBee*, without explaining why it believed *Elrod* and *Branti* are no longer applicable to claims that do involve the political loyalty or affiliation, the Fifth Circuit concluded that, under *Connick*, the Court was constrained to apply the *Pickering* balancing test to claims addressing political loyalty. *McBee*, 730 F.2d at 1013. However, nothing in *Connick* supports the conclusion that the analysis from *Elrod* and *Branti* is no longer applicable in an appropriate case. The Fifth Circuit's error in that regard is not a basis for granting *certiorari* in this case in which the Ninth Circuit correctly applied First Amendment law.

II.

Petitioner failed to preserve his contention that the *Elrod-Branti* exception does not apply because his claim was not based solely on political affiliation.

Petitioner contends that "most significantly" the Ninth Circuit's ruling was wrong because, under this Court's decision in *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), the *Elrod-Branti* exception does not apply to his First Amendment claim because that claim is not based "solely upon political affiliation." (Petition at 16-17) However, Petitioner's argument in that regard was made far too late in this case to be a proper basis for granting his Petition.

In addressing his claims against Sheriff Hand in the District Court, Petitioner contended that there were two reasons why the *Elrod-Branti* exception did not apply: (1) the *Elrod-Branti* exception applies only to at-will employees and Petitioner was not an at-will employee; and (2) the *Elrod-Branti* exception is available only to hiring officials "with discretion to appoint individuals to employment" and Sheriff Hand was not the hiring authority. (CR 45 at 4-9) Although Petitioner expanded those two arguments (CR 45 at 5-9), he never argued that the *Elrod-Branti* exception did not apply because his claim involved more than political affiliation. As to his First Amendment claim against Yamhill County, Petitioner argued that (1) Yamhill County failed to demonstrate that Petitioner's candidacy for Sheriff "caused any disruption to the efficient operation of Yamhill County's workplace," and (2) the *Elrod-Branti* exception does not apply because Petitioner was not an at-will employee. (CR 45 at 10)

In his opening brief in the Ninth Circuit, Petitioner made the same arguments in challenging the District Court's determination that Respondents were entitled to summary judgment under the *Elrod-Branti* analysis:

> There are two reasons that the court's analysis of the law is wrong. First, the *Elrod-Branti* exception applies only to "at will" employees and Mr. May was not an at will employee. Second, the *Elrod-Branti* exception is applicable only when "the hiring authority" demonstrates that political considerations are "appropriate requirements for the effective performance of the public office involved." [*Fazio*, 125 F.3d at 1333.]. In a County where patronage historically has not been used, where elected administrators have no discretionary authority to hire, where the hiring authority expressly authorizes its employees to engage in political activity, and where there is no impact on the performance of the public office involved, the *Elrod-Branti* exception simply does not apply.

(Opening Brief at 42) Again, Petitioner then explained those arguments in detail, but never argued that the *Elrod-Branti* exception did not apply because his claim involved more than political affiliation. (Opening Brief at 44-49) Nowhere did Petitioner cite *O'Hare Truck Service* or even come close to making the argument on which he now relies – that the *Elrod-Branti* exception does not apply because Petitioner's First Amendment claims were not based "solely on political affiliation." Instead, Petitioner raised that issue for the first time in his Reply Brief in the Ninth Circuit. (Reply Brief at 17-22) Because Petitioner never raised the issue in the District Court, and did not even raise it on appeal until his Reply Brief, this Court should refuse to consider the issue. *See California v. Taylor*, 353 U.S. 553, 556 n. 2 (1957).

III.

In any event, the Ninth Circuit's decision correctly applied the law and does not raise any new issues concerning First Amendment rights.

A. This Court's decision in *O'Hare* does not require a different result.

Petitioner contends that the *Elrod-Branti* exception does not apply because his claim involves something more than political affiliation. His argument is based on his construction of this Court's decision in *O'Hare Truck Service, supra.* (Petition at 16-18) Even if this Court considers that argument in light of the fact that it was not preserved, Petitioner is wrong on the merits. Petitioner's claim was one for political affiliation or political loyalty.[5] Petitioner has always contended that Sheriff Hand eliminated Petitioner's position because he ran against Sheriff Hand in the election and debated him on issues involving the Sheriff's Office. (CR 40, ¶23; Petition at 18) Nothing in *O'Hare* requires a public employer to keep in a high-level position a public employee with views contrary to that of an elected official who is accountable for making and enforcing policy.

In *O'Hare,* this Court addressed the question whether the political affiliation rules from *Elrod* and *Branti* applied to independent contractors hired by a public body and who are excluded from work for refusing to support a political candidate. 518 U.S. at 715. Although this Court discussed *Elrod* and *Branti,* this Court had no opportunity in *O'Hare* to apply the rules from *Elrod* and *Branti* because the contractor involved there had no relationship with

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[5] As discussed below at page 22, there is no Constitutional basis for distinguishing between political affiliation and political loyalty.

the Mayor akin to the kind of high-level position discussed in *Elrod* and *Branti*. This Court simply did what the Seventh Circuit had refused to do – it extended the rules concerning political affiliation to independent contractors. Nothing in *O'Hare* changes the rule for public employees in a position involving policymaking; communication with the legislative body and the public about policy; representation of the elected official before the legislative body, at union grievances, and elsewhere; and responsibility for policy implementation. In such cases, the interest of the employer in having those positions filled by a person who shares the views of, and is loyal to, the elected official are appropriate in order to fulfill the State's important interest in "promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Branti v. Finkel*, 445 U.S. at 517.

B. There is no Constitutional basis for distinguishing between "political loyalty" and "political affiliation."

Petitioner contends that this case should be treated differently because there is a difference between "political loyalty" and "political affiliation." He relies on the fact that elections for sheriff in Oregon are nonpartisan. (Petition at 3, 11, 13-14) However, Petitioner fails to provide any meaningful reasons for treating the situations differently.

In *Jenkins v. Medford*, the Fourth Circuit applied the *Elrod-Branti* exception to a case involving political loyalty where the contention was that the plaintiff was discharged because he ran against the elected sheriff. The Fourth Circuit recognized that the issues are essentially the same – whether a deputy demonstrates opposition to the Sheriff's positions and actual or potential disloyalty

and whether the Sheriff must attempt to implement his policies through deputies who have expressed clear opposition to him. 119 F.3d at 1164-65. Whether the differences between the elected official and the employee arise because they are members of different political parties or because they share different goals and views on more specific matters concerning the operation of the Sheriff's Office is not relevant to the question of the effect on the State's interest, recognized in *Pickering*, in "promoting the efficiency of the public services it performs through its employees."

Other Courts have reached similar conclusions. In *Dickeson v. Quarberg, supra*, the Tenth Circuit addressed a challenge to dismissals in a case where the Record did not make clear the party affiliations of the Sheriff and his predecessor. The Court concluded that the lack of a clear record was irrelevant because the *Elrod-Branti* rationale applies intraparty as well as interparty. 844 F.2d at 1437 n 2. The Tenth Circuit also stated that the defendant can fall within the *Elrod-Branti* exception by showing that either party affiliation or political association and support are appropriate requirements for effective performance of the public office involved. *Id.* at 1441; *accord Terry v. Cook*, 866 F.2d at 377 ("no practical difference between the lack of loyalty punished by Sheriff Cook in this case and the lack of party affiliation punished by the defendants in *Elrod* and *Branti*."); *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985) (*Elrod-Branti* exception applied even where the issue did not involve allegiance to different parties).

Petitioner contends that the Fifth Circuit has "specifically rejected application of the *Elrod-Branti* analysis to 'political loyalty' claims." Petitioner relies on *McBee v. Jim*

Hogg County, Tex., supra. (Petition at 15) Petitioner misreads that decision. Although, as discussed above at page 17, the Fifth Circuit concluded that the *Elrod-Branti* exception did not apply to the claims at issue in *McBee*, the decision did *not* turn on the fact that the case involved claims based on political loyalty rather than political affiliation.[6] Instead, the Fifth Circuit applied the *Pickering* analysis based on the Fifth Circuit's construction of this Court's decision in *Connick v. Myers, supra. See McBee*, 730 F.2d at 1014.

Nothing about the nature of this Court's decisions concerning discharge or discipline for reasons involving political views or expression is affected by the fact that the race for a particular position is nonpartisan or even that candidates may be from the same political parties. As is clear from the recent Presidential primaries, there is room for substantial divergence of views and positions even within one party. Moreover, even Petitioner agrees that he held positions different than those of Sheriff Hand. (Petition at 18) It is that fact, not simply membership in, or support for, a political party that makes the political nature of the issues important.

C. Petitioner's allegation that he was not an at-will employee is not relevant to his First Amendment claim.

Petitioner erroneously contends that the *Elrod-Branti* exception does not apply because he was not an at-will employee. Petitioner incorrectly argues that his alleged

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[6] In *McBee*, the plaintiff had run against the elected sheriff in a democratic primary. The sheriff won the primary and ran unopposed in the general election. Thus, issues of different party affiliation were not involved. *See* 703 F.2d at 838 n.1.

property interest in his position[7] changes the nature of his First Amendment rights. (Petition at 19) Petitioner simply mixes the analysis of his right to Due Process with the analysis of his rights under the First Amendment. However, the claims are subject to two very different analyses. Even if Petitioner could establish a property interest that would entitle him only to certain Due Process protections,[8] the right to Due Process does not change the nature of his rights under the First Amendment. Instead, this Court has made clear that, in First Amendment cases, it is irrelevant whether the employee has a property interest in the employment. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72, *reh'g denied*, 497

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[7] Although Petitioner argues that he had a property interest in his position as Captain (Petition at 6, 11, 19, 20), and that he was deprived of that property interest without Due Process (Petition at 21), Petitioner did not include in the questions presented any issue concerning whether he had a property interest or was denied Due Process. Instead, Petitioner simply summarily states that he presented evidence that he had a property interest (Petition at 20) and that remand of the Due Process claim is appropriate because the Ninth Circuit based its disposition of that claim on its resolution of the First Amendment claim. (Petition at 21 n. 2) Because Petitioner failed to include questions about whether he had property interest or whether he was denied Due Process, this Court should decline to consider those issues. *See* Sup. Ct. R. 14.1(a).

[8] The Record in this case establishes that, even if Petitioner could establish a property interest in his position as Captain, he received all the process that he was due. Before his position was eliminated, Sheriff Hand gave Petitioner notice that the position was being eliminated. Petitioner had an opportunity to protest the decision and he took advantage of that opportunity – his lawyer had numerous contacts with Yamhill County in which the lawyer set out Petitioner's position and requested that the decision be rescinded. (CR 36, Ex. 1 at 17, 27-29, 37-38; Ex. 3 ¶¶7-9 and attached Ex. F)

U.S. 1050 (1990) (question whether employees had a First Amendment right not to be denied promotions, transfers, or other job-related benefits was unrelated to the question whether they had a property right in their current positions or the benefit they sought).

In any event, even if Petitioner's theory was correct – *i.e.*, that the *Elrod-Branti* exception applies only to at-will employees – the outcome is still the same. Petitioner did not have a property interest in his position as Captain and, therefore, the *Elrod-Branti* analysis applies.

The Fourteenth Amendment protects people against deprivation of a property interest without due process. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Petitioner had a constitutionally protected property interest in his position only if he had a reasonable expectation of continued employment in the sense of a "legitimate claim of entitlement" to his position. It is not sufficient to have a mere need or desire for, or a "unilateral expectation" of, continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A legitimate claim of entitlement arises only where it is created by "existing rules or understandings that stem from an independent source such as state law." *Id.* at 577.

Under Oregon law, absent a contractual or statutory requirement to the contrary, employment is "at-will." Thus, an employee may be discharged without notice, at any time, for any reason, or for no reason at all. *Patton v. J. C. Penney Co.*, 301 Or. 117, 120, 719 P.2d 854 (1986); *Simpson v. Western Graphics*, 293 Or. 96, 99, 643 P.2d 1276 (1982). With respect to the status of a sheriff's deputies and employees in Oregon, under Or. Rev. Stat. § 204.601(2),

> All [deputies and employees of county officers] shall be appointed by such county officer, and

> shall hold office during the pleasure of the appointing officer.

Sheriffs are elected officials. Or. Rev. Stat. § 204.005(1). Moreover, Or. Rev. Stat. § 204.635(1) provides that "[a] sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff." Because, no other statute, contract, or county policy limited Petitioner's at-will status, Petitioner had neither a "legitimate claim of entitlement to his position," nor a constitutionally protected property interest.

Petitioner relied on certain County and former Sheriff's Office Policies as the basis for his claim that he had a property interest in his position as Captain.[9] However, none of those policies applied to override Petitioner's at-will status.

In Oregon, a county may alter the at-will status of a sheriff's employees if the county makes clear its intent to do so. *See Graves v. Arnado*, 307 Or. 358, 364, 768 P.2d 910 (1989).[10] Yamhill County has not done so. Unlike the policies at issue in *Graves*, nothing in Yamhill County Board Order 88-96 indicated an intent to override the

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[9] Because Petitioner does not discuss his Due Process claim, he does not explain the basis for his assertion that he had a property interest in his position. Petitioner based his claim on hearsay statements from other County employees and on three documents: (1) Yamhill County Board Order 88-96; (2) Policy 9 from a Sheriff's Office Policy Manual adopted by Sheriff Hand's Predecessor; and (3) Policy 14 found in a Manual in which a County Personnel Officer maintained all former and current County personnel policies. (*See* Ninth Circuit Opening Brief at 19-25; CR 36, Ex. 4 and attached Exs. A and Ex E. at 4; CR 46, Ex. A and attached Exs. I and K)

[10] *Graves* (a county *may* adopt rules that impose due process conditions on sheriff's statutory authority to discharge).

applicable statutes and make Board Order 88-96 applicable to the sheriff and his employees. Furthermore, Board Order 88-96 simply established procedural requirements for disciplining County employees. Even if Petitioner could establish that he was disciplined, those procedural requirements do not transform a unilateral expectation of continued employment into a protected property interest.[11]

Petitioner also cannot establish a property interest by relying on the Sheriff's Office Policy Manual adopted by Sheriff Hand's predecessor. That policy manual was not binding on Sheriff Hand. *See Graves*, 307 Or. at 364 (sheriff's authority to appoint deputies and employees "may not be limited by a predecessor sheriff's action"); *Board of Klamath Cty. Comm. v. Select Cty. Employees*, 148 Or. App. 48, 53, 939 P.2d 80, *rev. denied*, 326 Or. 57 (1997) (outgoing board cannot enter into contract limiting grounds for incoming board to discharge). Because Sheriff Hand did not agree to be bound by existing policies (CR 36 at ¶10 and Ex. 3 at ¶14), and because Petitioner cannot rely on the policy manual adopted by the former sheriff, Petitioner cannot establish a protected property interest based on that manual.

Finally, Petitioner's at-will status was not modified by Personnel Policy 14 on which he relied. Assuming Petitioner could establish a claim based on a policy

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[11] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[t]he categories of substance and procedure are distinct" and property "cannot be defined by the procedures provided for its deprivation"); *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) ("State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right").

shown only to others, there is no evidence that Policy 14 ever was adopted by the Board and made effective in Yamhill County. Moreover, if it was effective, Policy 14 was superseded when the County adopted Board Order 88-96. Finally, by its own terms Policy 14 applied to union members. Because Plaintiff was not a member of any union, Policy 14 does not apply to him. (CR 36, Ex. 2 at 2-3, 7; Ex. 4 ¶¶3-5; CR 46, Ex. I at 1-20) Neither Policy 14, nor any of the other policies on which Petitioner relied, gave him a property interest in his position.

D. The fact that the Board of Commissioners approved Sheriff Hand's decision does not preclude application of the *Elrod-Branti* exception.

Petitioner contends that Sheriff Hand was not the hiring authority and, therefore, the *Elrod-Branti* exception does not apply. (Petition at 6, 11-12, 19-20) Petitioner is wrong. Under Oregon law, the Board of Commissioners determines the number of employees, including deputies, and their salaries. Or. Rev. Stat. § 204.601(1). However, the employees are chosen by the sheriff. Or. Rev. Stat. §§ 204.601(2); 204.635(1). Thus, the Board had to authorize the positions, such as Captain, and determine their salaries. However, appointments to those positions were made by the former Sheriff. After Sheriff Hand was elected, Yamhill County both approved his plan to reorganize the Sheriff's Office by approving the position of Undersheriff rather than the two Captains' positions, and also approved of the creation of the two positions to which Petitioner and Mr. Hailey eventually were appointed. (CR 36, Ex. 3 at ¶9-10) The ultimate decision of who to place in those positions was made by Sheriff Hand.

Moreover, even if Board approval of Sheriff Hand's decisions meant that Sheriff Hand did not have authority

to reorganize the Sheriff's Office, that would not change the outcome here. The *Elrod-Branti* exception would be meaningless if it did not apply to both the individual public official and the public body. *See Fazio v. City and County of San Francisco, supra* (*Elrod-Branti* exception precluded liability for both the District Attorney and the public body).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX A

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Or. Rev. Stat. § 204.005 (1999) provides, in relevant part:

> There shall be elected at the general election, by the electors of each county, the following county officers:
>
> (1) A sheriff.

Or. Rev. Stat. § 204.601 (1999) provides:

> (1) The county court or board of county commissioners of each county shall fix the number of deputies and employees of county officers whose compensation is to be paid from county funds.
>
> (2) All such deputies and employees shall be appointed by such county officer, and shall hold office during the pleasure of the appointing officer.

Or. Rev. Stat. § 204.635 (1999) provides, in relevant part:

> (1) A sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff. The sheriff of any county may appoint deputies in the county for the purpose only, and with authority only, to receive and serve summons and civil process in any suit or action. A certified copy of the appointment of a deputy sheriff shall be filed with the county clerk, and the person appointed shall, before

entering upon the duties of the office, take and file with the county clerk the oath of office.

. . . .

(3) A deputy has the power to perform any act or duty that the principal has, and a person specially appointed to do a particular act has the same power in relation to the particular act authorized. The principal is responsible for the conduct of such deputy or person specially appointed except as provided in subsection (4) of this section.

(4) In counties having a civil service system covering deputy sheriffs, the sheriff shall not be responsible for the conduct of deputy sheriffs or persons specially appointed as provided in subsection (2) of this section.